MOTION FILED
MAY 25 2001.

(3)

No. 00-1300

IN THE
SUPREME COURT OF THE UNITED STATES

DOUGLAS PAUL DODGE,

*Petitioner,*

v.

KATHRYN LUCILLE & DONALD GRAVILLE,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

# MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF AARP IN OPPOSITION TO PETITION FOR CERTIORARI

ROCHELLE BOBROFF*
AARP FOUNDATION LITIGATION

MICHAEL SCHUSTER
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae* AARP

*Counsel of Record

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# MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF RESPONDENTS

AARP moves for leave to file the accompanying brief amicus curiae in support of the position of Respondents in opposition to the Petition for Writ of Certiorari in the case of *Graville v. Dodge*, which is before the Court from the judgment and opinion of the Arizona Court of Appeals.

Pursuant to Supreme Court Rule 37.3, AARP counsel sought consent of the parties to the filing of the brief. Counsel for the respondents granted consent. Counsel for petitioner withheld consent.

AARP is a national nonprofit membership organization of persons age fifty and older with approximately 34 million members in the United States. AARP's research indicates that approximately seventy percent of Americans over age 50 are grandparents. The AARP Grandparent Information Center, established in 1993, serves as a national resource center for grandparents who are raising their grandchildren. Moreover, the AARP Research Group has recently conducted an extensive study regarding grandparent visitation.

The issue of constitutionality of the best interest of the child standard in grandparent visitation statutes is of great importance to AARP and many of its members. AARP recently filed an amicus brief in the Court's grandparent visitation case, *Troxel v. Granville*, 530 U.S. 57 (2000). The AARP amicus brief in *Troxel* included an analysis and comparison of all fifty grandparent visitation statutes nationwide. Following the *Troxel* decision, AARP filed amicus briefs in grandparent visitation cases before several state courts. AARP respectfully requests that this Court grant AARP permission to file an amicus brief to address the ways

in which the instant case differs from the *Troxel* case previously before this Court.

May 25, 2001 Respectfully Submitted,

Rochelle Bobroff
(Counsel of Record)
AARP Foundation Litigation

Michael Schuster
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae*
AARP

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ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

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## BRIEF *AMICUS CURIAE* OF AARP IN OPPOSITION TO PETITION FOR CERTIORARI

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## INTEREST OF *AMICUS CURIAE* [1]

AARP is a national nonprofit membership organization of more than 34 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. Approximately seventy percent of older Americans are grandparents. AARP & The Roper Organization, *Mature America in the 1990s: A Special Report from Modern Maturity Magazine and the Roper Organization*, MODERN MATURITY, 1995. The AARP Grandparent Information Center, established in 1993, serves as a national resource center for grandparents

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[1] In compliance with Rule 37.6 of this Court, *amicus curiae* AARP states that no counsel for any party authored this brief in whole or in part, and that no party or entity other than this *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

who are raising their grandchildren. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all citizens.

## ARGUMENT

This brief addresses the second question raised by the Petitioner in his Petition for Writ of Certiorari, *i.e.*, whether the Arizona grandparent visitation statute, ARIZ. REV. STAT. ANN. § 25-409 (West 1994), violates the United States Constitution.

### *TROXEL V. GRANVILLE* DID NOT INVALIDATE THE ARIZONA GRANDPARENT VISITATION STATUTE

The Court should not take certiorari in the instant dispute because the appeal of the issue of the constitutionality of the grandparent visitation statute was not properly preserved. The Arizona Court of Appeals ruled that the Arizona grandparent visitation statute is constitutional in a 1999 decision in this case that the Petitioner failed to appeal to this Court. *Graville v. Dodge*, 985 P.2d 604, 611-612 (Ariz. Ct. App. 1999), *review denied*, No. CV-99-0091-PR (June 16, 1999). In subsequent rulings in this matter before the Arizona courts, Petitioner continued to challenge the constitutionality of the statute. The Arizona Court of Appeals did not address the constitutionality of the statute in the instant appeal because the issue was not preserved for review. *Graville v. Dodge*, 5 P.3d 925, 929 n.2 (Ariz. Ct. App. 2000), *review denied*, No. CV-00-0225-PR (Dec. 5, 2000).

Petitioner suggests that his failure to appeal the earlier ruling on the constitutionality of the statute should be excused because the Court's recent decision in *Troxel v. Granville*, 530 U.S. 57 (2000), mandates the invalidation of the Arizona statute. Petition for Writ of Certiorari ("Petition") at 17. In fact, the *Troxel* decision was quite clear that its ruling did not extend beyond the Washington visitation statute. Both the plurality decision of Justice O'Connor and the concurrence of Justice Souter explicitly stated that the *Troxel* case did not even

address whether a showing of harm was required in other states' grandparent visitation statutes. 530 U.S. at 73 (O'Connor, J., plurality); *id.* at 77 (Souter J., concurring).

Petitioner argues that his case and the *Troxel* case are "hard to distinguish." Petition at 17. This argument is without basis. In fact, there is very little in common between the instant case and the *Troxel* matter. The Washington and Arizona statutes are markedly different, and the facts are not similar.

The constitutional defects that the Court identified in the Washington statute in *Troxel* are not present in the Arizona grandparent visitation statute. The Washington statute applied to any person; the Arizona statute applies only to grandparents and great-grandparents. The Washington statute applied to all children; the Arizona statute confers visitation rights only to children whose parents are divorced, unmarried, or deceased. The Washington statute listed no factors to be considered in determining the child's best interest; the Arizona statute delineates several factors, including the historical relationship between the child and grandparents. *Compare* ARIZ. REV. STAT. § 25-409, *with* WASH. REV. CODE § 26.10.160 (1994) (amended 1996).

Thus, the Arizona statute is unlike the "breathtakingly broad" Washington statute. *See Troxel*, 530 U.S. at 67 (O'Connor, J., plurality). Indeed, in an unrelated case not appealed to the Court, the Arizona appellate court concluded that the Arizona statute did not suffer from the constitutional infirmities identified in *Troxel*. *Jackson v. Tangreen*, 18 P.3d 100, 103 (Ariz. Ct. App. 2000).

Moreover, the facts of this case are quite different from *Troxel*. In *Troxel*, the children had never resided with the paternal grandparents, and they had always resided with their mother. In the instant case, the children resided with and were raised by the maternal grandparents for several years, and the father did not reside with the children for several years.

An increasing number of children in this country are living with their grandparents. The Census Bureau reported that the

number of children residing in households headed by grandparents increased from 2.2 million children in 1970 to 3.9 million in 1997, an increase of 75 percent. This demographic change has included a recent increase in the number of grandparents raising grandchildren. One million four hundred thousand children live in a household where neither parent is present and the grandparent assumes the role of primary care giver. TERRY A. LUGAILA, U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, P20-514, CURRENT POPULATION REPORTS: MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE) iii, tbl. A (1998). Recognition of the changing demographics of American society, including the heightened role of grandparents in raising children, led to the passage of grandparent visitation statutes in all 50 states.[2/] Indeed, Justice

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[2/] *See* ALA. CODE § 30-3-4.1 (1989); ALASKA STAT. § 25.20.065 (Michie 1998); ARIZ. REV. STAT. ANN. § 25-409 (West 1994); ARK. CODE ANN § 9-13-103 (Michie 1998); CAL. FAM. CODE § 3104 (West 1994); COLO. REV. STAT. §19-1-117 (1999); CONN. GEN. STAT. § 46b-59 (1995); DEL. CODE ANN. tit. 10, § 1031(7) (1999); FLA. STAT. ANN. ch. 752.01 (West 1997); GA. CODE ANN. § 19-7-3 (1991); HAW. REV. STAT. § 571-46.3 (1999); IDAHO CODE § 32-719 (1999); ILL. COMP. STAT. 750/5-607 (West 1998); IND. CODE § 31-17-5-1 (1999); Iowa Code § 598.35 (1999); KAN. STAT. ANN. § 38-129 (1993); KY. REV. STAT. ANN. § 405.021 (Banks-Baldwin 1990); LA. REV. STAT. ANN. § 9:344 (West Supp. 2000); LA. CIV. CODE ANN., art. 136 (West Supp. 2000); ME. REV. STAT. ANN. tit. 19A, § 1803 (West 1998); MD. CODE ANN., FAM. LAW § 9-102 (1999); MASS. GEN. LAWS ch. 119, § 39D (1996); MICH. COMP. LAWS ANN. § 722.27b (West Supp. 1999); MINN. STAT. § 257,022 (1998); MISS. CODE ANN. § 93-16-3 (1994); MO. REV. STAT. § 425.402 (Supp. 1999); MONT. CODE ANN. § 40-9-102 (1997); NEB. REV. STAT. § 43-1802 (1998); NEV. REV. STAT. § 125C.050 (Supp.1999); N.H. REV. STAT. ANN. § 458:17-d (1992); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 1999-2000); N.M. STAT. ANN. § 40-9-2 (Michie 1999); N.Y. DOM. REL. LAW § 72 (McKinney 1999); N.C. Gen. Stat. §§ 50-13.2, 50-13.2A (1999); N.D. CENT. CODE § 14-09-05.1 (1997); OHIO REV. CODE ANN. §§ 3109.051, 3109.11 (West Supp. 1999); OKLA. STAT. tit. 10, § 5 (Supp. 1999); OR. REV. STAT. § 109.121 (1997); 23 PA. CONS. STAT. §§ 5311-5313 (1991); R.I. GEN. LAWS §§ 15-5-24 to 15-5-24.3 (Supp. 1999); S.C. CODE ANN. § 20-7-420(33) (Law. Co-op. Supp. 1999);

(continued...)

O'Connor's plurality opinion in *Troxel* stated: "Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties." 530 U.S. at 64.

Over half of the nation's grandparent visitation statutes require courts to consider the strength of the relationship between the grandparents and grandchildren prior to awarding visitation. Arizona's statute directed the court's attention to the historical relationship between grandparents and grandchildren. The Arizona court correctly concluded in this case that because "maternal relatives had been a vital influence on the children and had seen them on almost a daily basis for several years, eliminating those relationships would likely be detrimental to the well-being of the children." *Graville v. Dodge*, 985 P.2d at 613.

Petitioner minimizes the strong bonds between the Respondents and their grandchildren, calling the Respondents "genetic grandparents." Petition at 16. Legislatures in many states were deeply concerned by the hostility of custodial parents to a former spouse's parents. For example, in Michigan, the legislative history notes: "Many grandparents report that they have been cruelly prevented from maintaining contact with their grandchildren by the animosity of former children-in-law and their new spouses." H. LEGISLATIVE ANALYSIS SECTION FOR S. 439 & 440 (Mich. 1982). *See also* 21 S. PROC., Pt. 2, 1978 Sess. 33-34 (Conn. 1978); *Hearing on LB 105 Before the Senate*, 89th Leg., 1st Sess. 87-90 (Neb. 1985). Thirty-one states' statutes, including Arizona's

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[2](...continued)
S.D. CODIFIED LAWS § 25-4-52 (Michie 1999); TENN. CODE ANN. §§ 36-6-306, 36-6-307 (Supp. 1999); TEX. FAM. CODE ANN. § 153.433 (West Supp. 2000); UTAH CODE ANN. § 30-5-2 (1998); VT. STAT. ANN., tit. 15, §§ 1011-1013 (1989); VA. CODE ANN. § 20-124.2 (Michie 1995); WASH. REV. CODE §§ 26.09.240, 26.10.160 (1998); W. VA. CODE §§ 48-2B-1 to 48-2B-7 (1999); WIS. STAT. §§ 767.245, 880.155 (1993-1994); WYO. STAT. ANN. § 20-7-101 (Michie 1999).

grandparent visitation statute, explicitly provide that petitions for grandparent visitation shall be permitted after the adoption of the child by a step-parent.[3/] As noted throughout the legislative history of the 50 states' grandparent visitation statutes, the objective of these statutes is solely to protect the well-being of the nation's children by preserving important bonds between children and their grandparents.

## CONCLUSION

For the reasons stated, amicus AARP urges the Court to deny the petition for certiorari in this case.

May 25, 2001

Respectfully submitted,

Rochelle Bobroff
(Counsel of Record)
AARP Foundation Litigation

Michael Schuster
AARP
601 E Street NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae*
AARP

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[3/] These states are Alabama, Alaska, Arizona, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, West Virginia, and Wyoming.